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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CLEMENTE CORONEL PEREZ, Defendant and Appellant.	B173350 (Los Angeles County Super. Ct. No. KA059276)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed in part, reversed in part, and remanded with directions.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Clemente Perez was convicted, following a jury trial, of four counts of assault with a firearm in violation of Penal Code[1] section 245, subdivision (a), one count of shooting at an occupied motor vehicle in violation of section 246, one count of attempted robbery in violation of sections 664 and 211, one count of robbery in violation of section 211, and one count of murder in violation of section 187, subdivision (a). The jury found true the allegations that appellant personally used a firearm in the commission of the count 6 assault within the meaning of section 12022.5, subdivision (a)(1), personally used a firearm in the commission of the robbery within the meaning of section 12022.53, subdivision (b), and personally used and personally and intentionally discharged a firearm in the commission of the murder within the meaning of section 12022.53, subdivisions (b), (c), and (d). The jury also found true the allegation that the murder was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The trial court sentenced appellant to 72 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in denying his *Pitchess*[2] motion for discovery of police officer personnel records, and in denying his new trial motion based on discovery violations. We conditionally reverse the judgment as to counts 1 though 4 involving the assaults on the Preston brothers and remand this matter with directions to the trial court to conduct an in camera review of the personnel file of the two officers involved in this case, as set forth in more detail in our disposition. We affirm the judgment on counts 5, 6, 7 and 9.

Facts

Appellant, a member of the Azusa 13 gang, was convicted of crimes which occurred on three different dates: assaults on the Preston brothers on June 2, 2002;

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *Pitchess* v. *Superior Court* (1974) 11 Cal.3d 531.

assault on and attempted robbery of Arthur Chattsian and robbery of Zareh Ter-Stepanian on July 1, 2002; and the murder of Nicolas Young on July 2, 2002. All three of these incidents involved the use of the same .357 magnum revolver.

On June 2, 2002, appellant had been Jennie Escobedo's boyfriend for about seven months. Escobedo had two children fathered by Brian Preston. On the night of June 2, Brian and his brothers Daniel Preston and Robert Preston, stopped by Escobedo's apartment to drop off some milk for Brian's children. Appellant was present and a fistfight ensued outside the apartment between appellant and the three Preston brothers. As the brothers drove away in their station wagon, shots were fired at the car.

A resident of the area identified appellant from a photographic line-up as the shooter. She did not identify him at trial.

Los Angeles County Sheriff's Detective Gean Okada testified at trial that Brian and Daniel identified appellant as the shooter. At trial, Brian and Daniel denied telling Detective Okada that appellant was the shooter. They denied knowing the identity of the shooter. Robert also testified that he did not know who fired the shots.

Two spent rounds removed from the station wagon by Robert and seized by police were tested later and found to match a stainless steel .357 magnum revolver used in the murder of Young and the Chattsian robbery.

In the evening of July 1, 2002, Arthur Chattsian pulled his car into the a driveway in the 18000 block of Nearfield Avenue in Azusa. Zareh Ter-Stepanian and Carlos Guerrero were in the car with Chattsian. A car pulled in behind them and blocked them in. Four people with guns got out of this car and approached Chattsian's car, asking where the people in the car were from. Appellant went to Chattsian's window, demanded money, and hit Chattsian in the head with the butt of his shiny revolver, causing him to bleed profusely. Chattsian did not hand over any money to appellant. Another man demanded money from Ter-Stepanian. Ter-Stepanian gave him $10, which was all the cash he had.

This incident was investigated by Los Angeles County Deputy Sheriff Nicholas Cannis, in part because it resembled a similar earlier incident which he was investigating.

Ter-Stepanian and Guerrero could not identify the man at Chattsian's window. Guerrero identified Marcos Salazar and Robert Ramirez as two of the robbers. Ter-Stepanian also identified Salazar as one of the robbers. Salazar and Ramirez were both members of Azusa 13. Chattsian identified appellant as the man who hit him with the gun.

Chattsian's blood was found on the handle of the stainless steel .357 magnum revolver used in the murder of Young.

On July 2, 2002, at about 5:00 p.m., Nicholas Young and Jonathan Chacon were walking near the intersection of Stichman and Rath in Valinda. A blue car stopped near them and two men with guns got out. One of the men asked them where they were from. Chacon replied: "We're not from nowhere." Young started to run away. The two men fired their guns at Young. Young's arms flew up in the air and he fell to the ground. Chacon ran in the opposite direction. Chacon heard more gunfire. He told police that he heard bullets whizzing past his head.

Chacon returned to Young's body in a few minutes and asked bystanders to call police. Los Angeles County Deputy Sheriff Luis Siordia received a call about the shooting at 5:06 p.m. Deputy Siordia was the first law enforcement official to arrive at the scene. Young was still trying to breathe at that time. Young was pronounced dead about ten minutes later. No witness was able to identify the shooters.

Detective Okada came to the crime scene. While he was there, he received word that a drive-by shooting had occurred in a nearby neighborhood, and that a .357 magnum had been left in the street. The gun was found by Baldwin Park Police Officer Carillo when she responded to a call of shots fired at about 5:31 p.m. on July 2. Detective Okada also learned that a person with a gunshot wound to his wrist had been admitted to a hospital in Covina at about 5:46 p.m. That person was appellant.

A bullet recovered from Young's body matched the .357 gun found after the drive-by shooting.

Appellant testified in his own defense at trial. He claimed that the Preston brothers beat him up on June 2. He denied firing a gun at the Prestons' car. He also denied being present at the Chattsian robbery. Appellant was at home the night of July 1.

He denied any involvement in the shooting of Young or Chacon. He denied knowing Marcos Salazar or Robert Ramirez. Appellant had been a member of Azusa 13, but quit "gang-banging" in November 2001, when he met Escobedo.

Appellant explained that on July 2, a friend, Andy Lopez, came to his house. Appellant believed that Lopez was there to talk to him about paying for a car that appellant had wrecked. Lopez told appellant to get into Lopez's car, and appellant complied. The car drove to Baldwin Park. Appellant was very nervous because he still had an Azusa 13 tattoo, and Azusa 13 members are not welcome in Baldwin Park. Lopez told appellant to get out of the car. As appellant did so, he saw three apparent gang members getting out of a car about 60-75 feet away. The men made gang signs at him.

Appellant got back into the car. A passenger in Lopez's car pulled two guns out and gave one to appellant. It was the same as or similar to the .357 magnum recovered by police. The passenger told appellant that the men appeared to be retrieving something. He instructed appellant to stick the gun out the window and fire at the men. Appellant put the gun out the window. Before he could fire the gun, he was hit in the wrist by a bullet fired by the passenger. Appellant dropped the gun. Lopez took appellant to the hospital in Covina.

Discussion

1. *Pitchess* motion

Appellant contends that the trial court erred in denying his motion for discovery of police officer personnel records. Appellant sought complaints that Detectives Okada and Carver falsified police reports, planted evidence, gave false testimony, committed perjury, made false arrests or fabricated probable cause. In support of this request, appellant's counsel declared that statements attributed to the Preston brothers by Detectives Okada and Carver were not in fact made by the brothers. We agree that the trial court erred.

The trial court's grounds for denying the motion are not clear. The court stated: "Based on the [police] files that I have before me, I am going to deny the motion at this

time." The trial court's pre-ruling comments suggest that it believed that the statements at issue were an insignificant part of the case against appellant and that the court did not believe appellant's counsel's declaration. It was not the trial court's role to decide whether the police officers or the Prestons were telling the truth. The court considers only whether the scenario is plausible.

A trial court's ruling on a motion for discovery of police officer personnel records is reviewed for an abuse of discretion. (*People* v. *Memro* (1995) 11 Cal.4th 786, 832.)

Evidence Code section 1043 provides that the party seeking discovery of law enforcement personnel records must submit an affidavit showing "good cause" for their discovery, setting forth the materiality of the requested documents and stating "upon reasonable belief" that a governmental agency actually has them. (Evid. Code, § 1043, subd. (b)(3).) Once "good cause" is shown, the trial court examines the material sought *in camera* to determine its relevance to the case according to the guidelines in Evidence Code section 1045.

Here, appellant's counsel filed a declaration stating: "People arrested or detained, and attorneys, friends, or relatives of those people, make complaints to the investigating department concerning its law enforcement officers, alleging that said police officers committed unnecessary acts of excessive force, aggressive conduct, violence, dishonesty, untruthfulness, fabrication of probable cause, and planting of evidence at the time of arresting or detaining those people." This is a statement upon reasonable belief that a governmental agency has records of any complaints made against the two officers. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 417-418.)

A showing of good cause requires a defendant to demonstrate the relevance of the requested information by providing a "specific factual scenario" which establishes a "plausible factual foundation" for the allegations of officer misconduct committed in connection with defendant. (*City of Santa Cruz* v. *Municipal Court* (1989) 49 Cal.3d 74, 85-86.) Although the factual scenario and foundation must be set forth in an affidavit or declaration, there is no requirement of personal knowledge on the part of the declarant or affiant. (*Id*. at pp. 86-89.) The threshold showing of good cause and materiality the

defense must make to justify an *in camera* review of the records is "relatively low" or "relatively relaxed." (*Id*. at pp. 83-84.)[3]

Here appellant's counsel filed a declaration that Brian, Robert and Daniel Preston were interviewed by Detectives Okada and Carver and that the Prestons "indicated that the statements attributed to them by the detectives are false." The detectives' reports show that they were investigating reports of gunshots fired in the 700 block of 5th Street and indicate that the Prestons stated that appellant fired at them as they drove away. Thus, counsel's declaration is reasonably understood to say that the statements about appellant firing a gun at the Prestons are false.[4]

This is a sufficiently specific factual scenario showing that it is possible that the officers may not have been truthful and conspired to frame appellant for at least the assault against the Prestons. (*People v. Hustead*, *supra*, 74 Cal.App.4th at pp. 416-418; *People* v. *Gill* (1997) 60 Cal.App.4th 743, 750.) The Prestons' statements that the detectives lied, even though they may or may not be true, are plausible because it does at this stage of the proceedings create an objectively reasonable factual dispute.

Since there was a plausible factual scenario of possible lying and evidence fabrication, it was relevant whether the officers had been accused of falsifying police reports, planting evidence, giving false testimony or committing perjury. (*People v. Hustead*, *supra*, 74 Cal.App.4th at p. 418.) Thus, the trial court erred in denying appellant's request for complaints about those four activities.

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[3] The issue of how specific and plausible a factual scenario a defendant need provide is now before the California Supreme Court in *Warrick* v. *Superior Court* (2003) 107 Cal.App.4th 1271, review granted June 25, 2003, S115738.

[4] Of course, the reports also contained statements by the Prestons about incidental subjects, such as Brian's relationship with Escobedo, which the Prestons did not dispute. Appellant's counsel sought leave to file a supplemental declaration to clarify this point, but his request was denied.

We see no error in the trial court's decision to deny appellant's request for complaints about making false arrests or fabricating probable cause. There is no allegation of either of these activities in appellant's counsel's declaration.

Any error in denying defendant's *Pitchess* motion is subject to harmless error analysis. (See *People v. Memro* (1985) 38 Cal.3d 658, 684; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The evidence presented at trial did not render the trial court's failure to conduct an in camera review harmless. The Prestons denied that appellant was the shooter, and denied telling Detectives Okada and Carver appellant was the shooter. Detective Okada stated that the Prestons did identify appellant as the shooter. Appellant denied being the shooter. While an independent witness did identify appellant in a photographic line-up as the person who shot at appellant, she could not identify appellant in court. Thus, it is possible that a jury might not have convicted appellant of counts 1 through 4 if the testimony of the detectives were discredited.

We see no probability that discrediting the detectives' testimony would have led to a different result on the remaining counts. The detectives were not in charge of the investigations of those offenses, and there is nothing in the record before us to suggest that they had any opportunity to improperly influence those investigations. Further, there was direct evidence of appellant's role in the Chattsian robbery and his use of the .357 gun in assaulting Chattsian. That same gun was used the next day in the Young murder. Thus, the evidence on those counts would be strong absent any evidence of the assaults on the Prestons.

We are unable to determine whether there is a reasonable probability that the discovery sought by appellant would have led to admissible evidence helpful to appellant in his defense of counts 1 through 4. There may not have been any relevant complaints against the officers. In that case, appellant would not have been prejudiced. In such circumstances, we remand this matter to the trial court to conduct an in camera review of the officers' files in accordance with the instructions in our disposition. (See *People* v. *Hustead*, *supra*, 74 Cal.App.4th at pp. 418-423 [setting forth limited remand procedure].)

2. New trial motion

Appellant contends that the trial court erred in denying his motion for a new trial based on the prosecutor's post-trial disclosure that it had recorded calls made from jail by members of Azusa 13, including appellant. Appellant contends that the recording of a conversation he had with Mayra Salazar constituted material exculpatory evidence on the murder and attempted murder convictions and that it was reasonably probable that appellant would receive a more favorable verdict if evidence of this conversation was introduced at trial. We see no error.

As the trial court pointed out in denying the motion, the contents of the telephone call between appellant and Mayra Salazar were known to appellant as soon as they were known to law enforcement officials. The court found that to grant a new trial on the basis of the prosecutor's failure to disclose information known to appellant would be "absurd." We agree.

It is well settled that "[f]acts that are within the knowledge of the defendant at the time of trial are not newly discovered even though he did not make them known to his counsel until later . . . ; [Citations.]" (*People* v. *Greenwood* (1957) 47 Cal.2d 819, 822.) To the extent that appellant claims that he did not know that the telephone conversation was taped, this claim does not assist appellant. "Knowledge of the facts themselves, rather than knowledge of the precise manner of their recital, is the important factor in determining whether the evidence subsequently presented is evidence which defendant 'could not, with reasonable diligence, have discovered and produced at the trial.' (Pen. Code, § 1181, subd. 8.)" (*People* v. *Greenwood*, *supra,* 47 Cal.2d at p. 822 [fact that third party had signed affidavit memorializing confession to crime was not newly discovered evidence where third party's confession was known before trial].)

The same is true of *Brady*[5] material. "'The purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him. . . . [T]here is no *Brady* violation when the accused or his counsel

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[5] *Brady* v. *Maryland* (1963) 373 U.S. 83

knows before trial about the allegedly exculpatory information and makes no effort to obtain its production.' *United States* v. *Cravero*, 545 F.2d 406, 420 (5th Cir.1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); see also *United States* v. *Prior*, 546 F.2d 1254, 1259 (5th Cir.1977) ('[N]umerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.')." (*United States* v. *Valera* (11th Cir.1988) 845 F.2d 923, 927-928.)

Disposition

The judgment on counts 5, 6, 7 and 9 is affirmed. The judgment on counts 1 through 4 is reversed and this matter is remanded to the trial court with directions to conduct an in camera hearing on appellant's *Pitchess* motion consistent with this opinion. If the hearing reveals no discoverable information in the officers' personnel files, the trial court is ordered to reinstate the original judgment and sentence and the judgment is ordered affirmed. If there is discoverable material in any of those files, it should be turned over to appellant so that he may determine whether that material would have led to any relevant, admissible evidence that he could have presented at trial. If appellant is able to demonstrate that he was prejudiced by the earlier denial of discovery, the trial court should order a new trial. If appellant is unable to demonstrate prejudice, the trial court is ordered to reinstate the original judgment and sentence and the judgment is ordered affirmed.

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ARMSTRONG, Acting P.J.

We concur:

MOSK, J.

KRIEGLER, J.*

* Judge of the Los Angeles County Superior Court, assigned by Chief Justice pursuant to article VI, section 6 of the California Constitution.